

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BETH HORTON**

Claimant

VS.

**DAIMLER CHRYSLER CORPORATION**

Respondent

AND

**LIBERTY INSURANCE CORPORATION**

Insurance Carrier

Docket No. 1,034,073

**ORDER**

Claimant requested review of the July 3, 2008 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on October 7, 2008.

**APPEARANCES**

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Andrew D. Wimmer, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that in the event the Board concludes that claimant sustained an accidental injury that arose out of and in the course of her employment, this claim would be remanded to the ALJ for further findings.

### ISSUES

The ALJ concluded the claimant's spastic dysphonia did not arise out of and in the course of her employment as a telephonic customer service/collections representative. And as such, he denied the claimant's request for compensation.

The claimant appealed this decision arguing that she met her burden of proof by establishing that her job required her to talk extensively on the phone to customers, thus causing her spastic dysphonia and chronic hoarseness.

Respondent maintains claimant failed to prove that her vocal problems arose out of and in the course of her employment. Thus, respondent argues that the ALJ's decision should be affirmed in all respects.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ succinctly and accurately summarized the facts surrounding this claim as follows:

The claimant was employed as a customer service collections representative. She testified that her job involved talking on the phone almost constantly, and these job duties were confirmed by a couple of coworkers who testified, Scott Harvey and Michelle Storm.

The claimant worked in this position for almost six years. She said that she had a couple of episodes prior to the date of accident where she lost her voice, once in September, 2005 and once again just before the end of 2005. She said that voice loss was not an ongoing problem, so apparently these episodes resolved. However, on January 10 or January 11, 2006, the claimant woke up and could not speak. The problem has persisted since that time, although the claimant has undergone speech therapy, and moved to a different position that does not require extensive talking. She has been diagnosed with spastic dysphonia, a neurological condition affecting the muscles in the throat that control the vocal chords.<sup>1</sup>

The ALJ also accurately outlined the medical testimony offered by the parties. He noted that Dr. Allen Parmet, a local occupational medicine specialist, testified that "there

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<sup>1</sup> ALJ Award (July 3, 2008) at 3.

is truly no known cause” for spastic dysphonia.<sup>2</sup> Dr. Parmet indicated that he examined claimant’s vocal chords and concluded that other than bowed vocal chords, he found no objective signs of injury or impairment, although he agreed that she was suffering from spastic dysphonia, a condition which he believed was wholly unrelated to her work activities. He went on to explain that according to the medical literature, when the onset for spastic dysphonia is idiopathic, as here, it is mostly due to genetics. And at one point he suggested that maybe claimant’s respiratory medications are affecting her voice. Dr. Parmet further testified that normally people with spastic dysphonia will improve when they rest their voice, something that has most definitely not occurred in claimant’s situation.

The ALJ appointed Dr. Peter Bieri to conduct an independent medical examination pursuant to K.S.A. 44-510e(a). Dr. Bieri is a retired otolaryngologist, or more commonly known as an “ear, nose and throat” doctor who now regularly conducts medical/legal examinations. He examined claimant, taking into consideration her work history and activities and noted her ongoing symptoms of hoarseness, voice fatigue and an overall loss of volume. He used a fiberoptic laryngoscopy to examine claimant’s vocal chords and larynx. He noted no physical abnormalities other than some bowing of the vocal chords.<sup>3</sup> Indeed, other than an abnormal function of the vocal chords (and some bowing) the surface of the chords was normal. Dr. Bieri acknowledged that if a person’s voice is overused, you will typically see “anatomic lesions in the lining of the vocal chords, either swelling, ulceration or a mass”<sup>4</sup>, none of which he saw when he examined claimant.

Dr. Bieri explained:

Q. Okay. You were aware at the time that these problems came on, that her job was on the phone with her occupation all day?

A. That’s correct.

Q. And would you expect with these problems, that would trigger problems in her work area to continue to do that type of work?

A. Yes.<sup>5</sup>

And later he further explained that “[t]echnically, spastic dysphonia is a diagnosis. Vocal abuse is technically a mechanism that produces hoarseness.”<sup>6</sup>

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<sup>2</sup> *Id.* at 3.

<sup>3</sup> Bieri Depo. at 21.

<sup>4</sup> *Id.* at 18-19.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 10.

Dr. Bieri reported that “prolonged vocal abuse certainly is a contributing factor but not the sole etiology of spastic dysphonia.”<sup>7</sup> He went on to rate claimant’s impairment. He assigned 9 percent impairment as the result of occupational vocal activity and 9 percent impairment as a result of functional spastic dysphonia, for which there is no known etiology but which was aggravated by her work. Dr. Bieri attributed the entire 18 percent rating to claimant’s work. Despite cross examination he never changed his opinion.

As was noted by the ALJ, in order for a claimant to collect workers compensation benefits she must suffer an accidental injury that arose out of and in the course of her employment. The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.<sup>8</sup>

The ALJ found that claimant failed to prove either her spastic dysphonia “arose out of” her employment or that her injury arose “in the course of” her employment. The Board has considered the parties’ arguments and a majority of the Board concludes the Award should be reversed as the majority believes the preponderance of the medical evidence supports the claimant’s arguments that her spastic dysphonia arose out of and in the course of her employment.

Obviously Dr. Parmet and Dr. Bieri have taken opposing views in this matter as to the cause of claimant’s vocal problems. Dr. Parmet seems to believe claimant’s spastic dysphonia has no cause, other than possibly due to some medications claimant takes or her genetic make up. On the other hand, Dr. Bieri, an experienced ENT, testified that prolonged vocal abuse “is a contributing factor” in spastic dysphonia. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>9</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>10</sup> A majority of the Board finds

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<sup>7</sup> *Id.*, Ex. 2 at 5 (IME Report).

<sup>8</sup> *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

<sup>9</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>10</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

based on Dr. Bieri's testimony, which they believe is more persuasive, that claimant's spastic dysphonia was *aggravated* by her work activities, namely the need for her to use her voice constantly during her long days of working 6 days a week. Accordingly, this matter is remanded to the ALJ for further proceedings on the remaining issues including average weekly wage and the nature and extent of claimant's permanent impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 3, 2008, is reversed and the claimant is found to have sustained a compensable injury. This matter is remanded to Judge Hursh for further proceedings consistent with the findings above.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

### **DISSENT**

The undersigned Board Member respectfully dissents from the majority's opinion. This member is not persuaded that claimant has met her burden of establishing that her spastic dysphonia is causally related to her work activities. Like the ALJ, there is certainly a temporal and logical relationship between the two, but the medical testimony is less than persuasive.

Neither physician who examined claimant found any physical evidence to support her claim that excessive use of the vocal chords was at the heart of her condition. This

may have been because neither of the two physicians who testified saw claimant immediately after she lost her voice. She was seen by a number of physicians, but none of their physical findings or opinions are present in the record. We are left with two physicians who saw claimant one time each, long after her job duties changed and she had stopped using her voice on a regular basis. Even Dr. Bieri, who saw claimant pursuant to an IME Order, noted no physical findings other than a slight bowing of the vocal chords. He even testified that if claimant had been suffering from vocal overuse, he would typically expect to see anatomic evidence of that overuse in the form of lesions, swelling or ulcerations, *none* of which were found in any of claimant's examinations contained within the record. Without such findings it is difficult to see how Dr. Bieri could make the causal leap between work and claimant's present condition. Given the passage of the time and claimant's lack of measurable improvement, it seems even more plausible that her condition was not caused by her work-related activities. In sum, this Board Member would find that claimant failed to satisfy her burden of proof in this matter and would, therefore, affirm the ALJ's Award.

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BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant  
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge